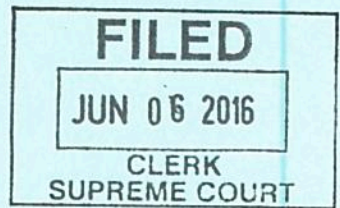


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
2015-SC-000224-D



KENTUCKY RIVER FOOTHILLS DEVELOPMENT  
COUNCIL, INC.

APPELLANT

v.

CATHY PHIRMAN, Administratrix of the  
Estate of MELISSA STEFFEN, JOANNE GILLIAM  
AND DARYLL GILLIAM, as Guardians of CONNER  
KEITH GILLIAM and CARTER RAY GILLIAM,  
unmarried infants,

APPELLEES

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**BRIEF OF APPELLEES, CATHY PHIRMAN, ADMINISTRATRIX  
OF THE ESTATE OF MELISSA STEFFEN, JOANNE GILLIAM  
AND DARYLL GILLIAM, AS GUARDIANS OF CONNER KEITH  
GILLIAM AND CARTER RAY GILLIAM, UNMARRIED INFANTS**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing were hand-delivered on June 6, 2016, to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, Kentucky 40601. I hereby further certify that true and correct copies of the foregoing were served upon D. Barry Stolz, Robert C. "Coley" Stolz III and Kimberly J. O'Donnell, Kinkead & Stolz, PLLC, 301 E. Main Street, Ste. 800, Lexington, Kentucky 40507; William G. Clouse, Jr., Madison Circuit Court Judge, 101 W. Main Street, Richmond, Kentucky 40475; and Samuel P. Givens, Jr, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, by U.S. Mail on this 6<sup>th</sup> day of June, 2016. I further certify that the Record on Appeal was not withdrawn by the undersigned counsel.

  
\_\_\_\_\_  
*Counsel for Appellees*

## **STATEMENT CONCERNING ORAL ARGUMENT**

The Appellees believe an oral argument could potentially assist the Court.



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## **COUNTERSTATEMENT OF THE CASE**

This case originated as a wrongful death action brought on behalf of the Estate of Melissa Steffen and her two minor children. [Record, Complaint, pp. 1-10]. Melissa developed Bipolar Disorder in her mid-twenties. As with many people, she struggled with the disease. During one particularly difficult time, Melissa was arrested on a drug charge and served some time in prison. [Record, Deposition of Cathy Phirman, pp. 6, 9 and 15]. When she was paroled in 2010, Melissa was directed to go through a drug counseling program. After some research she and her family located Liberty Place Recovery Center for Women, LLC (“Liberty”), which is an in-house drug and alcohol facility in Richmond, Kentucky. Liberty is owned and operated by the Appellant, Kentucky River Foothills Development Council, Inc. (“Kentucky River”). [Record, Deposition of Vicki Jozefowicz, p. 48]. Liberty has a contractual relationship with the Kentucky Department of Corrections (“DOC”) to provide treatment services. Liberty receives a per diem rate of \$32.64 for the people they receive by referral from the DOC. [Record, Deposition of Vicki Jozefowicz, pp. 77-78 and Deposition of Jerri Allison, p. 170].

Eventually, a spot became available at Liberty and Melissa applied for admission. During the screening process, Melissa notified Liberty that she suffered from depression and bipolar disorder, that she had a history of three prior suicide attempts, and that she was on medication to control these potential problems. [Record, Deposition of Jerri Allison, pp. 210-211]. The person at Liberty who was responsible for reviewing the applicants was the Safe Off the Streets (“SOS”) coordinator, Nurse Gilberta Tye. [Record, Deposition of Jerri Allison, p. 38]. Nurse Tye determined which potential clients Liberty could safely accept and manage in its in-house drug and alcohol program. She was also in charge of



facilitating the clients' medical and psychological needs during their stay at Liberty. During discovery, Nurse Tye reluctantly admitted Liberty was not "a safe environment" for clients like Melissa and that Liberty was not equipped to handle or manage individuals with underlying psychological problems or disease. [Record, May 2012, Deposition of Gilberta Tye, pp. 29, 35 and August 2013 Deposition of Gilberta Tye, pp. 29, 52]. There was no expert or lay proof during the extensive discovery taken in the underlying case to contradict that Liberty should not have accepted Melissa as a client due to her underlying psychological disease. In fact, both liability experts agreed that Liberty was not equipped to manage Melissa's needs and therefore should not have accepted her as a client. [Record, Deposition of Dr. Robert P. Granacher, Jr., pp. 20, 22; Record, Deposition of Dr. David Shraberg, pp. 39-40].

Remarkably, Nurse Tye also testified that notwithstanding the fact that she was in charge of intake decisions she was not aware of Liberty's policies related to accepting or rejecting clients. Nurse Tye had never even heard of the disease bipolar disorder. [Record, May 2012, Deposition of Gilberta Tye, pp. 30, 48]. Nurse Tye evidently never reviewed or simply ignored the intake information provided by Melissa. However, during discovery Nurse Tye stated Liberty would not accept clients who are potentially suicidal, but when asked how she knows when an individual is suicidal, Nurse Tye stated: "I wouldn't. I don't have no idea. I – that's out of my scope of practice. I wouldn't know if they were or not, unless they tell me they are." [Record, May 2012, Deposition of Gilberta Tye, p. 48].

Melissa entered the Liberty program in March 2010. Upon first arriving at Liberty, Melissa went without any medication for approximately six days because Nurse Tye was

on vacation and the medication that Melissa was allowed to have at Liberty was locked in Nurse Tye's office. [Record, Deposition of Jerri Allison, p. 150]. Melissa completely ran out of her depression medicine, which is the only medicine she could have at Liberty, on April 19, 2010. It appears Melissa went completely without any medication after April 20, 2010. [Record, Deposition of Jerri Allison, pp. 130, 125]. A little over three weeks later, on Friday, May 14, 2010, Melissa walked away from Liberty in a fog-like state. Megan Morris, a former employee at Liberty, testified that Melissa "was a different person" by the time she left Liberty. During her stay, Melissa had become more "sketchy, paranoid, and panicky." [Record, Deposition of Megan Morris, pp. 40, 42]. While at Liberty, Melissa had repeatedly told staff that she needed her medication and the staff had relayed that information to Nurse Tye. The staff gave Nurse Tye multiple notes regarding concerns about Melissa's declining mental state. [Record, Deposition of Megan Morris, p. 85]. According to forensic neuropsychiatrist, Dr. Robert P. Granacher, the longer Melissa was off her mood stabilizer, the more fragile she became. [Record, Deposition of Dr. Robert P. Granacher, Jr., p. 11].

A few hours after Melissa left Liberty on May 14, 2010, Megan Morris found her pacing along the side of the Bypass near Richmond. Megan described Melissa as being in a state of "absolute panic, state of terror." Melissa told Megan that she was "going to jump out in front of a truck." Megan called Nurse Tye who was on duty at the time. Megan told Nurse Tye about the situation and that Melissa wanted to return to Liberty. Despite the fact that Melissa had just threatened imminent suicide and that Liberty routinely let clients return to the program, Nurse Tye responded that it "wasn't her problem." Megan decided to drop Melissa at the Salvation Army and tell her to return Monday morning at which time



Nurse Tye would evaluate whether to let Melissa back in the program. The Salvation Army was not available because it was so early in the day. So, Megan dropped Melissa outside the Richmond Public Library with instructions to come back to Liberty the following Monday. [Record, Deposition of Megan Morris, pp. 49-57]. Dr. Granacher testified that by the time Melissa left Liberty she had become “an incompetent decision maker by virtue of being so depressed from bipolar illness.” [Record, Deposition of Dr. Robert P. Granacher, Jr., p. 120]. In summary, a young mother who had just threatened suicide, who had been without any medication due to Liberty’s neglect, and who could no longer exercise any kind of rationale judgment was abandoned in the library parking lot on May 14, 2010 to fend for herself per the instructions of Nurse Tye.

Perhaps coincidentally, on Sunday, May 16, 2010, Joanne Gilliam, an attorney who is the stepmother of Melissa’ children, had scheduled an appointment with Liberty to bring the boys to see their mother for a Mother’s Day visit. When they arrived at Liberty, an unknown person at Liberty told Ms. Gilliam that Liberty could not confirm or deny whether Melissa was at the facility. Whereupon, Ms. Gilliam expressed concern about Melissa’s well-being. Liberty then advised Ms. Gilliam that she was not a person who was authorized to receive information. Ms. Gilliam then contacted Melissa’s mother, Cathy Phirman. [Record, Deposition of Joanne Gilliam, pp. 14-15]. Ms. Phirman was authorized to receive information regarding her daughter. Ms. Phirman contacted Liberty repeatedly and was also told that Liberty could not confirm or deny whether Melissa was at the facility. [Record, Deposition of Cathy Phirman, p. 31]. Evidently, Melissa’s file was locked in a cabinet over the weekend and no one at Liberty could access the file to confirm that Cathy Phirman was authorized to receive information about her daughter. [Record, Deposition

of Jerri Allison, p. 105]. Ms. Phirman was not provided with any information over the critical weekend. Instead, Liberty employees told her to call back on Monday when Melissa's file was accessible.

Ms. Phirman called on Monday, May 17, 2010 at 8:00 a.m. She begged for information about her daughter. She told the Liberty representative that Melissa could be in danger if she left Liberty. Finally, three hours later she spoke with someone who confirmed that Melissa left Liberty days earlier. [Record, Deposition of Cathy Phirman, pp. 32-33]. They never provided Ms. Phirman with any other information regarding the circumstances of Melissa's "disappearance". Upon hearing that Melissa had left Liberty, Ms. Phirman immediately called the police to report her daughter was missing. [Record, Deposition of Cathy Phirman, p. 33]. She also drove to Richmond to check the local hospital or any other place where she might find Melissa. [Record, Deposition of Cathy Phirman, pp. 34-35]. Unfortunately, she never found her daughter.

No one heard from Melissa after that day. In October 2010, Melissa's decomposed body was found in an abandoned house in Richmond. [Record, Deposition of Cathy Phirman, p. 51]. The doctor who performed the autopsy, Dr. Christine Rolf, said Melissa had hung herself with an electrical cord. Based on the level of decomposition of the body, Dr. Rolf said that mid-May 2010 was the likely time frame of Melissa's death. [Record, Deposition of Dr. Christine Rolf, pp. 8-10, 21].

Against this backdrop, a lawsuit was filed on May 17, 2011 in Madison Circuit Court. Kentucky River answered the Complaint against it on July 1, 2011. In its Answer, Kentucky River did not plead immunity as a defense. [Record, Answer, pp. 23-25]. The parties engaged in extensive written and oral discovery, including approximately 15

discovery depositions. No specific discovery was taken regarding immunity as the defense was not raised until July 22, 2013, more than two years after the original Complaint and just a few weeks prior to a scheduled jury trial. At that time, Kentucky River also moved for summary judgment claiming it was entitled to immunity. [Record, Motion for Summary pp. 512-521].

Kentucky River was first incorporated as a private, nonprofit corporation in 1962. The executive director of Kentucky River is Vicki Jozefowicz. According to Ms. Jozefowicz, Kentucky River is now a private, nonprofit that operates as a community action agency. Kentucky River operates 50 programs, including the program operated at Liberty Place Recovery Center, they operate these programs in Clark, Madison, Estill and Powell Counties and also have programs that extend outside those service areas. Kentucky River owns the building and grounds where Liberty conducts business. [Record, Deposition of Vicki Jozefowicz, pp. 16-18]. The Appellant describes itself as a 501(c)(3) tax-exempt organization and says that Liberty Place is a substance abuse recovery program operated by Kentucky River. According to Ms. Jozefowicz, many of the policies at Liberty are policies used by the Kentucky Housing Corporation. Others are policies that are specific to and adopted by Liberty management. [Record, Vicki Jozefowicz, Deposition, pp. 29-32].

The trial court rejected Kentucky River's 11<sup>th</sup> hour immunity request. [Record, Order denying summary motion, pp. 827-829]. Actually, the trial court denied Kentucky River's immunity claim in two separate orders. The Appellant did not file a timely appeal from the correct order. [Record, Appellees' motion to dismiss appeal, Court of Appeals, Step Sheet #4]. Nevertheless, the Kentucky Court of Appeals accepted jurisdiction of the



appeal. In a 2 to 1 decision designated to be published, the Kentucky Court of Appeals also rejected Kentucky River's immunity claim.<sup>1</sup> The Kentucky Supreme Court accepted discretionary review.

## ARGUMENT

### I. THE SUPREME COURT SHOULD NOT REWARD PROCEDURAL GAMESMANSHIP AIMED AT AVOIDING A JURY TRIAL, PARTICULARLY WHEN A COMMUNITY ACTION AGENCY HAS NEVER RECEIVED IMMUNITY PROTECTION

Melissa Steffen, a young mother of two boys, died in May 2010. Her death was caused directly by various negligent and grossly negligent acts of a private nonprofit company, Kentucky River. Suit was filed on Melissa's behalf and her children's' behalf in May 2011. Subsequently, Kentucky River was provided with a defense through its insurance carrier. Immunity was not asserted as a defense in the Answer, nor was the concept raised during the lengthy discovery that was undertaken following the Complaint.<sup>2</sup> A trial was eventually scheduled for August 2013. On July 22, 2013, after all discovery was essentially completed and on the doorstep of trial, Kentucky River first asserted an immunity defense.

Below, Kentucky River failed to offer any explanation regarding why it waited until the 11<sup>th</sup> hour to assert an immunity defense. There are only two possible explanations:

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<sup>1</sup> Contrary to Kentucky River's assertion, the dissenting judge did not find immunity. Instead he believed the factual record on the immunity issue had not been adequately developed.

<sup>2</sup> It appears Kentucky River has never claimed immunity in any type of litigation prior to this case, which is understandable given the fact that it appears no community action agency has ever enjoyed immunity status in Kentucky or any other jurisdiction.

Kentucky River simply wanted to avoid or delay the trial; or Kentucky River did not want any actual discovery to be taken regarding the questionable immunity claim. The trial court denied Kentucky River's last second motion for summary judgment wherein they claimed immunity.<sup>3</sup>

The Appellants intentionally disregard or minimize these facts in their brief. But, there is authority for the proposition that immunity should be rejected out-of-hand when the factual record was not fully developed due to stalling, gamesmanship or worse by the entity who presents an 11<sup>th</sup> hour plea of immunity. *Louisville Metro Housing Development Corp. v. Commonwealth Security, Inc.*, 2013 WL 3237480 (Ky. App. June 28, 2013).<sup>4</sup> (Attached hereto as Appendix 1). In this case, there also is not a complete factual record regarding the nature, activities and connections of Kentucky River. The Appellant is attempting to use the sparse record concerning Kentucky River's business operation to its advantage. Kentucky River incorrectly suggests that the dissenting judge in the court of appeals accepted its immunity argument. In truth, the dissenting judge believed the record was not developed enough regarding the specific operations of Kentucky River for him to decide the immunity issue.<sup>5</sup> The absence of a complete record is entirely related to

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<sup>3</sup> A proposed order was submitted to the trial court by counsel for Appellees. That order was signed along with an order submitted by Kentucky River's counsel which incorrectly stated it was prepared by counsel for Appellees. Kentucky River originally appealed only from the incorrect order it sent to the Trial Judge. There was no timely appeal regarding the correct order. The court of appeals accepted the case in spite of the procedural flaw.

<sup>4</sup> CR 76.28(4)(c) allows citation of certain unpublished Kentucky appellate decisions when there is no published opinion that would adequately address the issue before the Court.

<sup>5</sup> Kentucky Court of Appeals' decision, Judge Vanmeter dissent, p. 29. (The lack of factual information in the record regarding the alleged "immunity" issue is related solely to Appellant's failure to even mention the issue until just before the scheduled trial. With that

Appellant's failure to assert immunity as a defense. In the *Louisville Metro Housing Authority Development Corp. supra* case, the court of appeals acknowledged that immunity is not waived by the failure to present the affirmative defense in a timely manner. However, the court under similarly egregious factual circumstances refused to allow the defense to be used as a strategic maneuver to avoid an unfavorable trial result. In discussing the Housing Authority's inexplicable delay in asserting an "immunity" defense at an earlier date, the *Louisville Metro Housing* court stated as follows:

We agree with the trial court that the Housing Authority's belated claim of immunity is disconcerting. Although it now vehemently contends that it cannot be sued for its torts and asserts the shield of immunity, this Court cannot comprehend its reason for waiting until after years of trial preparation and a trial to assert its defense. Its lack of diligence is particularly troublesome in light of the rule in this Commonwealth that a party claiming immunity is entitled to immediately appeal a trial court's denial of immunity. [Citation omitted]. Instead of attempting to avoid the burdens of litigation, the Housing Authority chose to wait until the burdens were borne and a judgment entered to assert its defense.

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Despite the well-established rules of procedure, the Housing Authority asserts that its claim of immunity was not waived by its failure to properly present it to the trial court and cites three cases in support of its position.

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The cases have a crucial common holding: All held that *sovereign immunity* may be raised at any time.

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Although the immunity question may not be waived by the failure to timely present it to the trial court, this Court cannot make a fact intensive inquiry based on a silent record. Yet, that is precisely what the Housing Authority proposes.

There is no evidence in the record to establish what the Housing Authority actually does, how and from where it receives funding, whether the Commonwealth or the Louisville/Jefferson County Metro Government controls, directs, provides funding to, or will be responsible for the

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said, it has been and remains Appellees' position that a private nonprofit operating as a community action agency is not entitled to immunity as a matter of law).



judgment in this case. Furthermore, there is no evidence that the Housing Authority was performing a governmental versus proprietary function when it committed torts against CSI. These are factual determinations incapable of resolution based on the record before this Court. Although we are bound by existing law not to resolve the immunity question solely on the basis of waiver, as an appellate court, we have no factual basis to make a determination whether governmental immunity applies to the Housing Authority. Consequently, we affirm the trial court's denial of immunity.

Id. at \*2-6.

Kentucky River has been in business as a private nonprofit corporation since 1962. It became a community action agency in 1968 (presumably so it would have access to federal grant money). It appears Kentucky River never claimed immunity at any point in its existence prior to this litigation. Kentucky River also did not plead immunity in its original Answer. Kentucky River never mentioned immunity throughout extensive written and oral discovery. The issue was asserted at the 11<sup>th</sup> hour to avoid a jury trial. The first function of our courts should be to ensure fairness and justice. The Kentucky Supreme Court should not reward Kentucky River's procedural gamesmanship by accepting its incomplete and unilateral factual statements as either sufficient or wholly accurate. Nor, should the Estate of Melissa Steffen and her children be put on hold for another five years while additional "proof" is taken regarding the details of Kentucky River's management, operations, financing, government affiliations, non-government affiliations and activities, etc. Additional discovery will not change the fact that Kentucky River has never been, and is not now, an entity that qualifies for the benefits of governmental immunity. More discovery would not change the fact that a community action agency designation alone does not qualify Kentucky River for immunity status. The reasoning of the court of appeals in *Louisville Metro Housing Development* is sound. The Kentucky Supreme Court should

not give the Appellant the benefit of the doubt if it has more questions regarding the nature of Kentucky River's business.

## **II. PRIVATE NONPROFIT COMMUNITY ACTION AGENCIES THAT HURT PEOPLE ARE NOT IMMUNE FROM SUIT**

In its well-reasoned opinion the Kentucky Court of Appeals recognized that the relatively minimal government oversight and the receipt of government funds through government grants that exist by virtue of the designation as a community action agency does not qualify Kentucky River for immunity status. The court of appeals recognized that in today's world a host of private agencies receive government funds and are subject to various types and levels of government "control" and oversight. But, "[a] line must be drawn somewhere before the concept of governmental immunity is extended far beyond any reasonable parameter."<sup>6</sup>

Kentucky River essentially argues that *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), was a turning point in Kentucky jurisprudence that greatly expanded immunity for so called quasi-governmental agencies, particularity community action agencies that operate private nonprofit corporations. The *Comair* case is an important decision in the field of sovereign immunity. However, any argument that the Kentucky Supreme Court has expanded immunity for private nonprofit agencies is incorrect.

The community action agency concept was created by the federal government. The court of appeals recognized that most states, including Kentucky, modeled their community

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<sup>6</sup> Kentucky Court of Appeals Opinion, page 22.

action agency statutes on Title II of the Economic Opportunity Act of 1962 (“the EOA”), which was the original federal legislation regarding creation of community action agencies. In most meaningful respects, the requirements for community action agency statutes are similar among the states. Significantly, all other jurisdictions that have addressed the immunity issue have also concluded that the designation as a community action agency does not qualify an entity for immunity.<sup>7</sup>

Kentucky also has never granted immunity to a community action agency.<sup>8</sup> Kentucky River has cited no contrary legal authority. Instead, Kentucky River argues that with the *Comair* decision, Kentucky is now unique in American jurisprudence regarding its treatment of community action agencies.

Kentucky River incorrectly says the court of appeals offered no explanation regarding why the Airport Corporation in *Comair* should be treated differently than

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<sup>7</sup> Kentucky Court of Appeals Opinion, pages 6-7, footnote 12, citing *Sanchez by Rivera v. Mortanez*, 645 A.2d 383,388 (Penn. 1994) (A private nonprofit corporation operating as a community action agency is subject to being sued); *Edwards v. Oakland Livingston Human Service Agency*, NV. 263738, 2006 WL 1044284, at \*1 (Mich. App. April 20, 2016) (there is no law that would transform a private nonprofit into a state agency or political subdivision simply by its designation as a Community action agency); *N.I. v. Lorain Head Start*, No. 98CA007254, 2000 WL 59911, at \*2-3 (Ohio App. Jan 12, 2000) (The private nonprofit corporation designated as a Community action agency is not a political subdivision entitled to the benefits of immunity); *Hauth v. Southeastern Tidewater Opportunity Project*, 420 F. Supp. 171 (E.D. Va. 1976) (a Community action agency is not entitled to claim sovereign immunity in a negligence action).

<sup>8</sup> The Court of Appeals did note that the United States Supreme Court has said that receipt of public funds in performance of a public function by a community action agency organization does not transform the organization into a federal agency for purposes of the Federal Tort Claims Act or make its employees, federal employees. (Kentucky Court of Appeals’ Opinion, p. 17, citing *United States v. Orleans*, 425 U.S. 807,816, 96 S.Ct. 1971, 1977, 48 L.E.2d 390 (1976).



Kentucky River with respect to the immunity issue.<sup>9</sup> In truth, the court of appeals recognized several distinctions between a regional airport completely organized under the auspices of the Lexington-Fayette Urban County Government and a private nonprofit that receives minimal control and oversight from any governmental unit and for purposes of this litigation, was offering drug and alcohol counseling services in-house for a daily stipend which was paid by the Kentucky Department of Corrections. As noted by the court of appeals, the statutes related to governance and formation of community action agencies do not grant immunity, but do include the powers and responsibilities of any other private, nonprofit incorporated in Kentucky.<sup>10</sup> The Court of Appeals further noted: (1) Kentucky River was established as a private nonprofit long before it was designated as a community action agency”;<sup>11</sup> (2) the county or counties have little, if any, involvement in the day-to-day operations of Kentucky River;<sup>12</sup> (3) the contract with the Department of Corrections is not dependent on the community action agency designation;<sup>13</sup> and (4) the various activities of Kentucky River are not delineated in *Comair* as one of the four state level governmental concerns: police, public education, tax collection and public highways.<sup>14</sup> The court of appeals clearly outlined why Kentucky River does not meet the essential government

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<sup>9</sup> Appellant’s brief, pp. 19-20.

<sup>10</sup> Kentucky Court of Appeals’ Opinion, p. 20.

<sup>11</sup> Kentucky Court of Appeals’ Opinion, p. 19.

<sup>12</sup> Kentucky Court of Appeals Opinion, p. 23.

<sup>13</sup> Kentucky Court of Appeals, Opinion p. 13.

<sup>14</sup> Kentucky Court of Appeals, Opinion p. 16.

function part of the *Comair* analysis.<sup>15</sup> Additionally all members of the Airport Board are appointed by the mayor. KRS 183.132(4)(e). The mayor or his representative sits on the Airport Board. The Airport Board exists solely to provide and maintain part of Kentucky's air transportation infrastructure. The Airport Board is also a legislative body, in some respects. KRS 183.132(3). Kentucky River has no legislative authority.

Again, the *Comair* court did not state or imply that its decision was a signal that the numbers of entities entitled to immunity will be greatly expanded. Rather, the Kentucky Supreme Court seemingly wanted to create a more definitive and workable rule that would protect legitimate governmental entities and, at the same time, recognize the basic rights of citizens to seek recourse for harm caused by others.<sup>16</sup> Trying to fit this case into the *Comair* framework is like trying to put a square peg into a round hole: It won't work.

### **III. KENTUCKY RIVER IS A PRIVATE NONPROFIT CORPORATION THAT DOES NOT QUALIFY FOR IMMUNITY STATUS**

#### **A.**

Initially, the court of appeals outlined the organization of the community action agency concept in the EOA originally enacted in 1981.<sup>17</sup> Then, the court of appeals discussed the

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<sup>15</sup> Kentucky Court of Appeals, Opinion pp. 18-24.

<sup>16</sup> *Comair* has not been without critics who have expressed concerns that the somewhat subjective analysis directed by the *Comair* court could result in inconsistent and unfair decisions that could result in morally indefensible outcomes. See Nathaniel R. Kissel, A "Preposterous Anomaly." Sovereign Immunity in Kentucky Following the Crash of Comair Flight 5191, 98 Ky. L.J. 889, 917 (2009 – 2010). This case would result in a morally indefensible outcome if the principles of *Comair* are expanded to include community action agencies.

<sup>17</sup> Kentucky Court of Appeals' Opinion pp. 6-7.

statutory scheme adopted by Kentucky in 1982 at KRS 273.405 to KRS 273.453, which governs the establishment of community action agencies.<sup>18</sup> Thereafter, it analyzed whether Kentucky River performed an integral government function. The statutes and accompanying regulations do not qualify a community action agency for immunity protection. There is nothing in the statutes that would indicate a legislative intent that community action agencies should be shielded from civil liability. The statutory duties of a community action agency are very general and include such things as: planning systematically for an effective community action program; providing planning or technical assistance to agencies, providing opportunities for low income people for regular employment in community action agency programs; establishing programs by which the poor and area residents concerned will be enabled to influence the character of programs affecting their interests, etc. KRS 273.441(1). The political subdivision, by statute, could designate a private, nonprofit as a community action agency. KRS 273.435(2). The governing board of a community action agency has “. . . the same legal powers and responsibilities granted under its state charter as the board of directors of any private, nonprofit incorporated in the Commonwealth of Kentucky, including the power to enter into legally binding agreements with any federal, state or local agency, or with any private funding organization for the purpose of administering programs or providing service.” KRS 273.439(1). As a private nonprofit corporation, Kentucky River has the power to “sue and be sued” and to “make contracts and incur liabilities”. KRS 273.171(2) and (8). The legislature did not alter or amend the rights and legal responsibilities that Kentucky

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<sup>18</sup> Kentucky Court of Appeals’ Opinion, pp. 7-15.



River had as an existing private nonprofit corporation when it adopted the community action agency statutes.

**B.**

The court of appeals also noted: (1) the day-to-day activities of community action agencies are not regulated by statute;<sup>19</sup> (2) nonprofit community action agencies are not limited in administering funds solely from state and federal grants;<sup>20</sup> (3) like other nonprofits, they can and do accept private donations;<sup>21</sup> (4) Kentucky River was not created at the behest of the state or any county;<sup>22</sup> (5) Kentucky River had operated and could continue to operate independent of the designation as a community action agency;<sup>23</sup> (6) the legislature provided that a private nonprofit operating as a community action agency has the same legal powers and responsibility, by statute, as any other nonprofit. This is proof that the legislative body did not intend to convert a private nonprofit into a governmental agency simply by the designation of community action agency;<sup>24</sup> (7) Kentucky River is not an entity that exists solely for the benefit of the state. It continues to offer services and programs outside the scope of its designation as a community action agency receiving federal grant money;<sup>25</sup> (8) the designation as community action agency did not require

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<sup>19</sup> Kentucky Court of Appeals, Opinion, p. 13.

<sup>20</sup> Kentucky Court of Appeals, Opinion, p. 13.

<sup>21</sup> Kentucky Court of Appeals, Opinion, p. 13.

<sup>22</sup> Kentucky Court of Appeals, Opinion, p. 19.

<sup>23</sup> Kentucky Court of Appeals, Opinion, p. 20.

<sup>24</sup> Kentucky Court of Appeals, Opinion, p. 20.

<sup>25</sup> Kentucky Court of Appeals, Opinion, p. 21.

Kentucky River to amend its articles of incorporation nor did it invest the state (or counties) with any interest in Kentucky River's real or personal property;<sup>26</sup> (9) Kentucky River had no direct government oversight of its day-to-day operations;<sup>27</sup> and (10) Kentucky River was not established to benefit the government.<sup>28</sup> And we add that Kentucky River has no taxing authority or known legislative authority.

With this background, the court of appeals considered the factors outlined in *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 803-804 (Ky. 2009), as a guide with respect to whether Kentucky River performs an integral government function. When one considers the fourteen factors mentioned in the court of appeals' opinion it becomes very clear that Kentucky River should not be immune from suit.

The factors considered were: (1) Whether state statutes and case law tend to characterize the entity as an arm of the state? Answer: No; (2) Whether state resources may be required in satisfying an adverse judgment? Answer: No; (3) Whether the state has a financial interest in the litigation? Answer: No; (4) How the entity is funded? Answer: In a variety of ways. But, not through taxation; (5) Its level of autonomy? Answer: As previously discussed, Kentucky River operates largely free of any government control or oversight with respect to its day-to-day operations; (6) Whether the entity deals primarily with local or statewide problems? Answer: Melissa Steffen was not a resident of the area.

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<sup>26</sup> Kentucky Court of Appeals, Opinion, p. 22.

<sup>27</sup> Kentucky Court of Appeals, Opinion, p. 23.

<sup>28</sup> Kentucky Court of Appeals, Opinion, p. 23.

And Kentucky River provides services outside the four county area; (7) How the courts treat the entity; Answer: No known court has ever granted immunity status to a comparable community action agency; (8) The ability to sue and be sued? Answer: Kentucky River has this right and responsibility by statute; (9) Whether the entity utilizes its own property? Answer: Yes; (10) Whether the entity can take or sell property? Answer: Kentucky River cannot condemn property, but it can sell its own private property; (11) The independent management authority of the entity? Answer: Kentucky River is independently managed; (12) Whether the entity performs governmental or proprietary functions? Answer: Depends on one's view of what constitutes these types of functions; (13) The entity's corporate status? Answer: Private nonprofit corporation; and (14) whether the entity is subject to statue taxation? Answer: Kentucky River is a 501(c)(3) corporation.<sup>29 30</sup>

Regardless of how one feels about accepting the factors outlined in *Caneyville* as a firm guideline for analyzing immunity of so-called “quasi-government” entities, it is apparent that anything more than a superficial consideration results in the undeniable conclusion that Kentucky River is not entitled to immunity status. Kentucky River should not be allowed to bootstrap its way into immunity status by simply jumping on the “quasi-governmental” agency bandwagon.

Again, *Comair* was not intended as a wholesale expansion of immunity. Nor, did *Comair* overrule all existing case law. There are cases both before and after *Comair* where

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<sup>29</sup> Kentucky Court of Appeals' Opinion, p. 17 for a list of the factors considered.

<sup>30</sup> Kentucky River's statement that it serves the “poor” sounds noble and maybe even somewhat “governmental”. But, that sort of bumper sticker statement does not entitle it to immunity.



immunity was rejected in somewhat similar situations. For example, in *Public Arts Organization – Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky. 1990), the court determined that a municipal corporation originally created by act of the General Assembly, with a Board appointed entirely by the Governor, with taxes assessed solely for the purpose of operating the municipal corporation and with a statutory mandate regarding the use of its revenues was not entitled to immunity. By analogy, the court quoted *Kentucky Region Eight v. Commonwealth*, 507 S.W.2d 489, 491 (1972), which stated that sovereign immunity should extend only to “departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure.” *Id.* at 332.<sup>31</sup> Similarly, in *Kea-Ham Contracting, Inc. v. Floyd County Development Authority*, 37 S.W.3d 703, 706 (Ky. 2000), a nonprofit entity originally created by Floyd County, with a six person board appointed by the County Judge Executive whose sole purpose was to promote economic progress was not entitled to claim immunity based on the fact that its funding was not entirely limited to appropriation from the central government and it was not directly under the day-to-day control of the government. Obviously, Kentucky River falls far short of immunity status if daily control and funding are important considerations.

Kentucky River adopted many of its daily rules from Kentucky Housing Corporation rules. Our courts have previously refused to extend immunity to claims involving housing authorities. In *Walden v. Housing Authority of Paducah*, 854 S.W.2d 777, 779 (Ky. App. 1991), the court determined that the Housing Authority in question was

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<sup>31</sup> We recognize the case before the court is a governmental immunity case. But, the same legal argument applies. Kentucky River does not fall within the regular administrative patterns and structure of the four counties it purportedly serves.

a municipal corporation that operated separately from the City of Paducah and was not entitled to claim immunity. See also, *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004) (although housing authorities are state agencies, they are not protected by governmental immunity).

Additionally, in a post *Comair* case, *Coppage Construction Company, Inc. v. Sanitation District No. 1 and DLI Properties – DKY, LLC*, 459 S.W.3d 859 (Ky. 2013), this Court considered whether a public sewer utility that provides services to three Kentucky counties is entitled to immunity. The court held that the sanitation district was not an “alter ego” or arm of the counties it served. The court also found that sewer and storm water management, while important for the counties, was not a traditional and necessary state function such as the functions performed by public schools, state police or public highways or transportation. Therefore, the sewer district failed on both prongs of the *Comair* immunity analysis. *Id.* at 864.<sup>32</sup> Here, we have a private entity that while still a private entity, became a community action agency after its birth. The counties are not the adoptive parent of Kentucky River. At best, they are like the uncle who visits on the occasional holiday. The entity, in this situation, provided drug and alcohol counseling. Drug counseling is a meaningful service, but is not a uniquely governmental service or an integral governmental service. The counties exercise very little control over Kentucky River’s operations. Kentucky River has a variety of funding sources. The legislative body

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<sup>32</sup> In the concurring opinion, Justice Venters noted that the concept of sovereign immunity was the outdated concept that the “king” can do no wrong and protection of the public purse. *Coppage Construction*, pp. 865-867. Perhaps it is time for the court to include these factors in its analysis of non-constitutionally protected, insured nonprofit private corporations who claim immunity protection under the gossamer thin argument that they are an “alter ego” of county governments.

did not express a desire to provide immunity protection to community action agencies. Kentucky River clearly does not function within the regular patterns of the counties' organization and structure.

#### **IV. GOVERNMENTAL IMMUNITY IN MANY SITUATIONS IS AN OUTDATED CONCEPT THAT IS CONTRARY TO BASIC PRINCIPALS OF JUSTICE**

Sections 230 and 231 of the Kentucky Constitution are the source of claims that the sovereign state is immune from lawsuits. These sections of the Kentucky Constitution allow the legislature to waive the sovereign's immunity either by direct appropriation of money from the state treasury or by specifying in what manner the state may be sued. The fact that the Kentucky Constitution provides sovereign immunity to the Commonwealth has expanded over time to include state and county agencies and claims from some entities that call themselves quasi agencies of state or county governments. In the process, perhaps other fundamental constitutional rights have been overlooked or not given the importance they deserve.

Section 14 of the Kentucky Constitution states:

All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have the remedy by due Course of law, and right and justice administered without sale, denial or delay.

And Section 2 of the Kentucky Constitution states:

Absolute and arbitrary power over the lives, liberty and property of freeman exists nowhere in a republic, not even in the largest majority.

Here, there is no statutory authority that authorizes immunity for Kentucky River. And even if there were such authority, the legislative body would have arguably been acting in excess of its constitutional prerogative. Kentucky River is not the



Commonwealth. It is not a county of the Commonwealth. It is not even a quasi-agency of a county of the Commonwealth.

Kentucky River originated as a private nonprofit entity. Several years after its original incorporation it received community action status, which allowed Kentucky River access to some government grant money. If it lost the community action agency status tomorrow it could continue on as it had before it became a community action agency. A litigant's constitutional right to trial should trump a tenuous claim of quasi-governmental immunity under these facts. Regardless of whether it is called a jural right, a constitutional right or simply the absence of legislatively pronounced immunity, Melissa's estate and her minor children have a fundamental right to have this case decided in front of a jury.

#### **V. THE ESTATE OF MELISSA STEFFEN AND HER MINOR CHILDREN HAVE A CONSTITUTIONALLY PROTECTED JURAL RIGHT**

To be clear, we do not maintain the legislature overextended itself by granting immunity to community action agencies. There is no reasonable interpretation of the statutes that justifies a conclusion that the legislature intended to grant immunity in these situations. Nonetheless, Appellant essentially argues that it was granted immunity by the enabling statutes. If this argument is accepted, it would result in an infringement on the estate and minor children's constitutionally protected jural rights.

Sections 14, 54 and 241 of the Kentucky Constitution have been interpreted as a constitutional mandate that ensures all citizens an opportunity to have their causes heard in court and prohibits the legislative body from infringing that right. *Caneyville*, *infra*, at 800. "The crux of the decisions to date has been that § 231 as a specific provision overrides § 14, 54 and 241 as general provisions, but **only** in suits which may be classified as brought

against the Commonwealth.” *Berns*, at p. 329 (emphasis in original). Here, there is no claim against the Commonwealth (or any county). Therefore, § 231 of the Kentucky Constitution cannot override our constitutional right to assert a civil action against Kentucky River.

A manifest purpose of the framers of the Kentucky Constitution was to preserve and perpetuate the common law right of an injured citizen to assert a lawsuit against the person or entity who negligently caused the injury. *Ludwig v. Johnson*, 49 S.W.3d 347, 351 (1932). Section 14 of the Kentucky Constitution supports the rights of every injured person to seek recourse in a court of law. And Section 241 of the Kentucky Constitution states, in part, as follows:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations or persons so causing same.

At the core, immunity is a legislatively or constitutionally created concept largely directed at the antiquated concept of protecting the king’s purse. Kentucky River can cite no constitutional authority for the proposition that it “magically” became entitled to immunity the moment it received the designation of a community action agency. Absent such authority, the estate of Melissa Steffen has a fundamental jural right to pursue a civil action against Kentucky River. There is no discernable public policy in the community action agency statutes authorizing immunity for these agencies. To the contrary, by statute Kentucky River retained the rights and responsibilities of any other private nonprofit which include the power to sue and be sued. Nor, has immunity ever been extended to a community action agency in this state (or apparently any other state). Furthermore, as a public policy matter the concept of immunity for so-called “quasi-government” agencies

should be contracted rather than expanded. It is a simple reality of the country we live in that the myriad of government regulations, controls, grants, connections, relationships, etc. are such that the temptation to claim immunity will exponentially expand unless the courts exercise sufficient control. This case is a perfect example of the excesses and injustices that can result if immunity arguments are taken to rather extreme limits.

Our government has grown a lot since immunity concepts were first developed. The tentacles of the government are many and long. These tentacles are wrapped in and around all types of private organizations with regulations, grants, reporting requirements and various degrees of oversight. These private organizations - often corporations like Kentucky River - also have a desire to protect their own purse and avoid legal responsibilities. These entities claim immunity if they believe it is a possible legal defense. In doing so, they claim they are nothing more than the alter ego of the sovereign king or a child of the king. Oftentimes, as in this case, the claim of immunity is both legally and morally indefensible. It is up to this court to draw the line as clearly as it can with respect to the myriad of entities that claim immunity by arguing they are quasi-operations of the government. In a civilized society there are public policy considerations in favor of an injured person's rights of recourse that must outweigh tenuous or even phony claims of having a close relationship to the king. No community action agency has ever received immunity status. Most legal experts believe immunity should be reined in rather than expanded. It is time to remove the emperor's clothes and lay the cards on the table, so to speak. Kentucky River is not a child of the king. Kentucky River is not even an adopted child of the child of the sovereign king. And even an adopted child of the king cannot inherit the throne. At most, Kentucky River vaguely knows the king and is lobbying this



court to accept this minimal connection as a shield of immunity against any responsibilities to the client it should have protected.

### **CONCLUSION**

For the foregoing reasons, the estate of Melissa Steffen and her children respectfully request that the portions of the trial court order and the Kentucky Court of Appeals' Opinion denying immunity be affirmed and that this case be remanded back to the trial court for a trial on the merits of the pending wrongful death action.

Respectfully submitted,

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